Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

July 2006

No jury trial to determine apportionment of settlement between heirs. After three heirs settled their wrongful death suit, they disagreed on the apportionment of the settlement proceeds between them. Over the objection of one of the heirs who claimed entitlement to a jury trial, the court decided the allocation issue in a bench trial. The Court of Appeal affirmed. *Code Civ. Proc.* §377.61 provides that "the court shall determine the respective rights in an award [for wrongful death] of the persons entitled to assert the cause of action," and since the proceedings are equitable, there is no right to a jury trial. *Kim v. Yi* (Cal. App. Second Dist., Div. 5; May 15, 2006) 139 Cal.App.4th 543 [42 Cal.Rptr.3d 841, 2006 DJDAR 5835].

Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to: http://members.calbar.ca.gov/discuss to explore the new bulletin board feature—just another benefit of Litigation Section membership.

Remember to first fill out the Member Profile to get to the Discussion Board!

Time for filing government claim for sexual abuse is not extended. *Code Civ. Proc.* §340.1 extends the statute of limitations for childhood sexual abuse for a period beyond the victim's attaining the age of majority. But this does not extend the time to file a claim against a governmental agency for such abuse. *V. C. v. Los Angeles Unified School District* (Cal. App. Second Dist., Div. 5; May 15, 2006) [2006 DJDAR 5843] (Not Publ.).

State Bar Court rejects "retainer" theory where lawyer failed to provide services. The State Bar Review Department ordered David Brockway suspended for two years after he retained fees without performing any services. The Review Department rejected Brockway's theory that he was paid a "true retainer." A true retainer fee is paid to secure a lawyer's availability and not for services rendered or to be rendered. Construing ambiguities in the retainer contract against the lawyer the department concluded that the agreement contemplated the performance of services. *Brockway v. State Bar* (St. Bar Review Dept.; May 15, 2006) [2006 DJDAR 5934].

Strict product liability claim not barred by doctrine of primary assumption of risk. In *Knight v. Jewett* (1992) 3 Cal.4th 296, [11 Cal.Rptr.2d 2], the California Supreme Court adopted the doctrine of primary assumption of risk which, as applied by many subsequent cases, absolves a defendant from liability where an injury occurs during a sporting event when the risk of such an injury is inherent in the sport. In *Ford v. Polaris Industries, Inc.* (Cal. App. First Dist., Div. 4; May 15, 2006) 139 Cal.App.4th 755, [43 Cal.Rptr.3d 215, 2006 DJDAR 6081], plaintiff sustained severe injuries after she fell from a jet ski. The jet-powered nozzle that propelled a high-pressure stream of water, entered her anus and tore apart her internal organs. Although the risk of falling off the jet ski is inherent

Litigation Section Events

A Week in Legal London
July 9-14, 2006

A Week in Legal London is an extraordinary opportunity to experience the inner workings of the English legal system, expand litigation skills and engage in thought provoking discussions with leading distinguished +members of the London legal community. Attend sessions at the Royal Courts of Justice, the Old Bailey, Magistrates and Crown Courts. Meet and dine with leading judges, barristers and solicitors. Visit the four Inns of Court and historic sites in London.

Oxford University Summer Program
Magdalen College, Oxford University

July 16-20, 2006

In conjunction with A Week in Legal London, the Litigation Section's Oxford University Summer Program is an "inside the walls" experience at Magdalen College, Oxford University. This program is a combination of both law and history, fascinating to all participants, attorneys and non-attorneys alike. You can choose to attend either the London or Oxford program or both. By attending both programs you will satisfy all you MCLE requirements including the mandatory subjects.

For a more complete description of each program see our web site, or call the Litigation Section at (415) 538-2546.

Click here: State Bar of California Week in the UK

in the sport, the court held that the risk of being injured because of the defective design of the watercraft is not. It therefore affirmed judgment for plaintiff in this product liability case.

Sanctions orders in limited civil cases are immediately appealable. Although pre-judgment orders generally are not appealable, an exception applies to "collateral orders," e.g. an order which is, in effect, a final judgment against a party growing out of a matter collateral to the main proceeding. (*See, Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119, [199 P.2d 668].) Until 1989, this meant that sanction orders were immediately appealable. In that year the legislature amended *Code Civ. Proc.* §904.1 by providing that sanction orders issued by the superior courts were only immediately appealable if they exceeded $750. In 1993, the section was further amended to raise the amount to $5,000.

But §904.1 does not apply to limited civil cases. Therefore when a sanction order is made in such a case, it is immediately appealable and failure to appeal from such an order within the time for filing appeals deprives the Appellate Division of jurisdiction to hear the appeal. *Drum v. Superior Court* (Cal. App. Fourth Dist., Div. 2; May 19, 2006) 139 Cal.App.4th 845, [43 Cal.Rptr.3d 279, 2006 DJDAR 6109].

No interlocutory appeal from sanctions order in federal court. As noted above, *Code Civ. Proc.* §904.1(a)(12) permits an immediate appeal from an order for monetary sanctions in excess of $5,000. Appeals from sanctions in smaller amounts in general jurisdiction cases are only permitted after final judgment. But the rule is different in federal court. Regardless of the amount of sanctions, the Circuit Courts lack jurisdiction to hear appeals from sanction orders until a final decision of the case wherein the sanction order was issued. *Stanley v. Woodford* (9th Cir.; June 7, 2006) 449 F.3d 1060, [2006 DJDAR 7035].

Maintaining an independent judiciary. On March 30, 2006, the ABA sponsored a conference on the impact on judges by partisan oratory, talk show chatter and blogger opinions that are rampant across the nation. A report to the conference concluded: "First, lawyers must speak out against attacks on judges and the courts.... Second, we need to educate the public—and those who represent them in Congress—on the importance of an independent judiciary.... And third, if we mean to preserve the independence of our courts, we need to use the political process to do it."

Court retains jurisdiction to review arbitrator's discovery order directed to a party not subject to the arbitration agreement. *Code Civ. Proc.* §§1283.1 and 1283.05, give arbitrators authority to enforce discovery subpoenas against nonparties in certain types of cases. Although section 1283.05 (c) limits judicial review of arbitrator's discovery orders, the court retains "vestigial jurisdiction" to review such orders directed at persons or entities who are not parties to the arbi-

Create Your Member Profile On-line

Watch for your access code in your mail, or obtain it from your State Bar dues statement. Then go on-line to create your profile and customize your interests. www.calbar.org

The Litigation Section of the California State bar is evaluating whether and how the *California Code of Civil Procedure* and *California Rules of Court* should be amended to deal with discovery of electronic information. The Section needs your help and asks that you take a few moments to participate in a member survey that seeks your experience and opinions about what is working and what is not working in this area. Your participation is anonymous unless you choose to share your contact information. The survey will take approximately 10 minutes.

To participate, click here or paste this web address into your web-browser: http://www.surveyconsole.com/console/takesurvey?id=195323

Your participation is important and greatly appreciated.

tration agreement. *Berglund v. Arthroscopic & Laser Surgery Ctr.* (Cal. App. Fourth Dist., Div. 1; May 22, 2006) 139 Cal.App.4th 904, [43 Cal.Rptr.3d 456, 2006 DJDAR 6233].

Mere creation of a dangerous condition does not render agency liable. Under *Gov. Code* §835, plaintiff must prove a public entity acted negligently or wrongfully before the agency may be liable. In *Metcalf v. County of San Joaquin* (Cal. App. Third Dist.; May 23, 2006) 139 Cal.App.4th 969, [43 Cal.Rptr.3d 522, 2006 DJDAR 6279], the jury found that the location of a stop sign created a dangerous condition. Nevertheless the Court of Appeal affirmed a judgment for defendant. The agency is not strictly liable for the creation of a dangerous condition. Plaintiff must also prove the agency acted negligently or wrongfully.

No Proposition 51 apportionment for intentional tortfeasors. Proposition 51 (*Code Civ. Proc.*, §§1431 to 1431.5) provides for the apportionment of noneconomic damages among tortfeasors. In *Thomas v. Duggins Construction Co., Inc.* (Cal. App. Fourth Dist., Div. 1; May 25, 2006) 139 Cal.App.4th 1105, [44 Cal.Rptr.3d 66, 2006 DJDAR 6396] defendant was found liable for an intentional tort (intentional misrepresentation) and the trial court denied its request that noneconomic damages be apportioned between it and other defendants. The Court of Appeal affirmed. Proposition 51 does not apply to intentional torts.

Utah court split on whether Lawrence v. Texas permits polygamous marriages. In the landmark U.S. Supreme Court ruling in *Lawrence v. Texas* (2003) 539 U.S. 558, [123 S.Ct. 2472, 156 L.Ed.2d 508] the Supreme Court held that constitutional privacy rights precluded criminal prosecution for sex between persons of the same gender. The defendant in *State v. Holm* (Utah Supr. Ct.; May 16, 2006) 2006 UT 31, [552 Utah Adv.Rep. 3, 2006 WL 1319595], was convicted of polygamy. The court confirmed the conviction. But Chief Justice Durham dissented, expressing the opinion that the bigamy conviction should be overturned. Under Lawrence, she wrote, the due process clause of the U.S. Constitution's 14th Amendment provides protection to private relationships between consensual adults.

No 170.6 challenge where case remanded for preparation of statement of decision. *Code Civ. Proc.* §170.6(a)(2) provides that an affidavit of prejudice may be filed against a judge whose judgment is reversed on appeal, "if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter." Where the Court of Appeal reversed a judgment because the trial court had failed to prepare a statement of decision and remanded the case to the trial court, ordering a statement of decision be prepared, the statute did not apply. On remand, the trial court is only reinvested with jurisdiction to the extent it is defined in the remittitur. The court therefore lacked jurisdiction to grant the motion under section 170.6. *Karlsen v. Sup.Ct. (Cannonball Acquisitions)* (Cal. App. Second Dist., Div. 5; May 30, 2006) 139 Cal.App.4th 1526, [43 Cal.Rptr.3d 738, 2006 DJDAR 6690].

Note: Although the Court of Appeal decided the case on the basis that the trial court lacked jurisdiction to do anything but follow the dictates of the remand, it seems that an alternative ground would also provide the basis for the same result. The statute is limited to situations where the appellate reversal requires a new trial. No such new trial was ordered here. Furthermore, if a party were permitted to disqualify the trial judge after a remand to prepare a statement of decision, a new trial would be inevitable. If the trial judge is incapacitated before filing a statement of decision, a new trial is mandatory. *Raville v. Singh* (1994) 25 Cal.App.4th 1127, [31 Cal.Rptr.2d 58].

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, click here.

Model Code of Civility and Professionalism

As Litigation Section members you can review the Model Code of Civility and Professionalism. We encourage you to do so and post your comments on the Discussion Board at http://members.calbar.ca.gov/discuss